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Andy Wightman, The Poor Had No Lawyers: Who Owns Scotland and How They Got It

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academic writing. That this has changed is both an important part of Gordon's legacy and offers hope for future debates about Scots criminal law.

After the high theory of these chapters, the next theme to be explored relates to specific issues concerning Scots criminal law. Demonstrating the range of topics discussed in this Festschrift is Sharon Cowan's piece on the criminal law's response to sadomasochistic practices. Scots criminal law has yet to face this issue in practice, and Cowan provides a provocative account of the path the courts should take when they do. More frequently-encountered matters are discussed in Peter Ferguson's chapter on the mental element in crime and Stuart Green's interesting treatment of theft by omission. Again emphasising the value of comparative approaches, Finbarr McAuley's account of developments in sexual offences involving children and teenagers in Ireland is helpful, particularly in comparison with the provisions of the Sexual Offences (Scotland) Act 2009.

The chapters by Claire McDiarmid and Gerry Maher continue the focus on specific issues. McDiarmid presents a strong normative and empirical case for limiting—rather than extending—the ambit of the partial-defence of provocation. The most convincing case for keeping provocation is probably the mandatory life sentence for murder, a topic which is considered in Maher's overview of the structure of homicide in Scots law. Maher's discussion is wide-ranging and uses recent Law Commission proposals on homicide to good effect to illustrate his points.

Although the chapters above are primarily concerned with the substantive law, Gordon's work has also touched on the law of evidence and procedure, which is the focus of the chapters by Ian Dennis and Peter Duff. These concern very contemporary issues (witness anonymity and disclosure of Crown evidence, respectively) and will thus be of great interest to those with their fingers on the pulse of Scottish criminal justice. Although not included with Duff and Dennis's chapters, J R Spencer's discussion of the codification of criminal procedure is similarly engrossing. Codification of procedure is, of course, something which has succeeded in Scotland but failed—for various reasons which Spencer explains exceptionally well—to take a significant hold south of the border. The remaining chapters are not thematically linked, but are nonetheless interesting. Robert Shiels details the historical development of the role of advocates depute, whilst Sheriff T Welsh provides an insightful account of potential human rights difficulties for the law on contempt of court.

Simply offering the above overview of the themes and topics in this book can hardly do justice to the fascinating range and variety of its seventeen substantive chapters. This is a well-produced book which anybody interested in criminal law, evidence or procedure will find a worthwhile investment. The chapters are also all accessible enough to be of interest to academics, students and practitioners of all levels.

Findlay Stark

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Andy Wightman, THE POOR HAD NO LAWYERS: WHO OWNS SCOTLAND AND HOW THEY GOT IT

Edinburgh: Birlinn (www.birlinn.co.uk), 2010. xii + 339 pp. ISBN 9781841589077. £20.

This is not a law book. Nor is it precisely a book about law. It is a book about land, viewed through the periscopes of economics, history, geography sociology and law. Mr Wightman, though not a lawyer, knows much about land law, and his concerns about land usually involve

questions of law. He is no novice. His best-known work, *Who Owns Scotland?*, appeared in 1996, but there have been other publications too, such as *Community Land Rights: A Citizen's Guide* (2009). His website at <http://www.andywrightman.com> is full of interest. The title of the new book is taken from an exclamation of one of the author's heroes, a name respected by everyone interested in Scottish legal historiography, Cosmo Innes, in that fascinating work published near the end of his life, *Lectures on Scotch Legal Antiquities* (1872) at page 155.

The new book has 32 chapters, largely self-contained. It could thus be described as a set of essays. The themes are too varied to be summarised. But the author has a tale to tell about grasping landowners, incompetent (or worse) burgh councillors, and flawed politics, leading to the concentration of landownership in too few hands, and the loss of community land rights. The word "reform" is ever-present, and the last chapter is a wish-list of future legal reforms. They include the scrapping of the law of positive prescription, the banning of *a non domino* dispositions, the extension of legal rights of succession (legal share) to heritable property, the recovery of common land, the restriction of land ownership to persons or entities based in the EU, "the ultimate ownership of all corporate owners should be declared", the promotion of community ownership, enhanced purchase rights for tenant farmers, a "one farmer, one farm" rule, a reduction in agricultural subsidies, the abolition of council tax and business rates coupled with the introduction of a land value tax, chargeable on all land including rural land, and the restoration of burghs as units of local government, and the reform of burghal common good law.

Over the past quarter of a century or so Scots property law has been transformed, partly by legislation, but partly by an academic revolution. But some specialist areas remain insufficiently developed. When a ship is sold, just how and when does ownership pass? Do we really know? There are comparable problems for at least some types of intellectual property. Reading the present book reminded me that, even for land law, there are dark hollows that would benefit from the flares of academic research. How much do we really know about commonities? About common good land? And so on. There has indeed been some useful recent work. Andrew Ferguson's *Common Good Law* (2006) comes to mind, as does Andrea Loux Jarman's "Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century" (2007) 28 *Journal of Legal History* 207. But more is needed. Perhaps one of the hurdles is that some of these areas belong to public as much as, or more than, to private law. For the public lawyers they smack too much of property law, and to the property lawyers they smack too much of public law. Mr Wightman's interest in these dark hollows will communicate itself to all readers, and ideally would stimulate research.

Academic research aspires to be objective, neutral, and fully researched. Mr Wightman's book, for all its merits, is not in the style of a PhD. It is tract for the times, seeking not only to inform but also to persuade. While I enjoyed it immensely, and admired the range of the information presented—I wish I had been able to read it before signing off the Scottish Law Commission's *Report on Land Registration* (February, 2010)—I was sometimes left with the dissatisfied feeling that one has after hearing a speech by an able politician. This is the feeling that one has heard one side of the story, but that there may be another side too. To justify this comment would take more space than is available in a short review, but I will mention a couple of examples. One is about the law of succession. Mr Wightman is concerned about the way that land can pass down the generations intact. He recommends that legal rights (legal share), currently based only on the moveable side of the estate, should be extend to land. Personally I would agree. But there are those who, far from extending the legal share of issue to land, would abolish it completely. There is a legitimate debate here that is not reflected in the book. Or take the law of positive prescription. The author attributes the introduction of positive prescription in 1617 to the self-interest of the class that dominated Parliament. Let that be so (though

one might remark in passing that the period chosen by the legislators of 1617 was a *long* one, namely forty years). Does that somehow subvert the justification of positive prescription in the 21st century? What of the fact that prescription is to be found in so many other modern legal systems? Perhaps a coherent case could be put together for making prescription – both negative and positive – more difficult, and even for abolishing it. But one would need to weigh the arguments on both sides, the benefits that flow from the law of prescription as well as the drawbacks. Balanced debate of this sort is too often lacking in this book. Nevertheless this is a most valuable work: well-written, provoking, extensively researched, often persuasive. It deserves a wide readership, and that readership should include all those interested in Scots property law.

George L Gretton
University of Edinburgh

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George Joseph Bell, PRINCIPLES OF THE LAW OF SCOTLAND, FOURTH EDITION, with an introduction by Kenneth G C Reid

Edinburgh: Edinburgh Legal Education Trust, Old Studies in Scots Law, vol 1, 2010. xxviii + xx + 910 pp. ISBN 9780955633225. £30.

One of the distinguishing features of Scots law, and of Scots private law in particular, is the role played by the works of the institutional writers. These texts, now all rather aged, continue to be regarded as formal sources alongside case law and statute. Needless to say, this means that they are very valuable to the student, the academic and the practitioner.

Sadly, with the exception of Stair's *Institutions*, access to them has been somewhat limited in recent years. The last editions of Bell's *Principles* and *Commentaries* and of Erskine's *Institute* were reprinted in 1989 and 1990 by Butterworths in conjunction with the Law Society of Scotland but these editions are themselves out of print. Publication of older Scottish legal texts has not kept pace with the advances in access to historic case law through the Justis and Westlaw databases. The Edinburgh Legal Education Trust's reprint of the fourth edition of Bell's *Principles* (published in 1839) is therefore particularly welcome. The text remains a key authority for many areas of private law, perhaps most notably in relation to common property and the law of error. This edition was the last to be prepared by Bell himself and the editorial updates in later editions are not recognised as having the same authority as Bell's text. Modern textbooks now provide an up to date statement of the law. Therefore, it is helpful to have Bell's thoughts without later accretions.

As well as being an important source for contemporary law, Bell's *Principles* mark a significant stage in the development of Scots law. While reflecting the institutional tradition in seeking to present the law in a systematic fashion with reference to continental European writers, it is also the first attempt to integrate reference to Common Law materials into a comprehensive treatment of Scots private law. Bell's works are therefore key sources for any attempt to understand the development of a mixed legal system in Scotland. The *Principles* are a substantial intellectual achievement, remarkable in covering a wide range of topics in a clear, coherent and economical manner which wears its learning lightly. As Professor Reid notes, their influence was not limited to Scotland. Foreign lawyers, notably the great American writers Kent and Story, also relied on them for Scots law.

Scotland is a small jurisdiction which has produced few legal thinkers of Bell's stature. Full advantage must therefore be taken of his contribution. It is perhaps unfortunate that he has